A

PP

v.

CHUA TEIK BENG

B

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[CRIMINAL TRIAL NO: (MT-1) 45-18-2006]
5 MARCH 2009

C ***CRIMINAL PROCEDURE:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Element of possession - Drugs found in exact place where accused's belongings were also found - Whether there was evidence of custody or control of drugs - Whether presumption under s. 37(da) Dangerous Drugs Act 1952 arose - Whether a possibility* D *others had access to the house and front room where drugs were found - Inferences from facts established - Whether benefit of doubt must be given to accused - Whether prosecution proved a prima facie case of actual possession against accused*

E The accused was charged with an offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in cannabis weighing 476.33 grams. Briefly, ASP Mohd Azhan Mohd Yusof (PW4) led a raiding party team of police officers to a single storey house at 4pm on F 19 February 2004. Four Chinese men were seen in the hall and all of them ran in different directions when PW4 showed them his authority card. Upon entering into the house, PW4 opened the door of the front room and found a Chinese man ('the accused') inside. The accused and three other Chinese men, who were G found in the kitchen, were all taken into custody and PW4 conducted body searches on them. Nothing was found on the accused, Chua Teik Li and Chua Seng Lee. However, a transparent packet suspected of containing heroin was found in the right pocket of one Lee Ley Chon's jeans. PW4 then H conducted a search of the front room where he found a 'GIANT' plastic bag on the shelf inside a plastic cupboard with its zipper open containing two brown envelopes. In one envelope a slab of compressed plant material suspected to be ganja was found and in the other envelope were found two slabs, one big and one I small also suspected to be ganja. A Maybank account book (P16), a passport (P17) and a birth certificate (P18) all in the name of Chua Teik Beng (the accused) were also found in the same place.

All the four Chinese men were arrested and charged under s. 39B DDA. Subsequently, the charges against Chua Teik Li and Lee Ley Chon were withdrawn and Chua Seng Lee died while in remand.

The prosecution submitted that there was strong evidence to support a finding that the accused was 'found to have had in custody or under control' the drugs. The surrounding circumstances pointing irresistibly to the guilty knowledge of the accused included (i) conduct of the accused in running to the front room where the drugs were found when the police raided the house and (ii) it was in the exact place where the drugs were found that the accused's Maybank book, passport and birth certificate were also found. The defence, however, contended that there was no evidence of custody or control of the drugs and therefore the presumption under s. 37(da) DDA that the accused was trafficking in dangerous drugs did not arise. The accused submitted that (i) the accused was arrested together with three other men in the house (ii) the drugs were found on the top shelf of the plastic cupboard which was open and anyone could have access to the cupboard at any point of time; (iii) the accused did not have exclusive access to the house and the front room as the house was also resided by Chua Seng Lee (deceased), Chua Teik Li and the accused's father (PW9) (iv) the prosecution failed to exclude the possibility of access by others to the house and to the front room where the drugs were found. Further, it was argued there was no evidence, direct or circumstantial, to show that the accused had such knowledge of the presence of the dangerous drugs found in the wardrobe. The accused submitted that the prosecution had failed to make out a *prima facie* case.

Held (acquitting and discharging the accused):

(1) Before the accused can be criminally incriminated with possession of the dangerous drugs the requirement of knowledge on the part of the accused must be satisfied. The accused must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Knowledge is an element of the state of the mind of a person. To establish possession the element of knowledge must be judged from his outward acts or omissions. Knowledge cannot be proved by direct evidence. It can only be inferred from the surrounding circumstances. The purpose

A with which he did an act is a matter of inference from what he did. In short, it is for the court to draw an inference from all the facts and circumstances of this case, giving due weight to the credibility of the witnesses. (para 27)

B **(2)** At the time of the police raid there were four persons in the house. PW9 said that the accused and his two brothers shared the front room where the drugs were found. PW9 also said that all three brothers could enter and exit the front room at any time. PW9 and all three brothers had the keys to the C house. In the circumstances, there was therefore a possibility others may have access to the house and the front room. In this respect, neither Chua Teik Lee or Lee Ley Chon were called to give evidence in court. In their absence, the following inferences could be drawn (i) that the accused alone D had sole and actual possession of the dangerous drugs; (ii) that the accused, Chua Teik Lee, Chua Seng Lee (deceased) and Lee Ley Chon had joint possession of the dangerous drugs or (iii) Chua Teik Lee or Chua Seng Lee (deceased) or Lee Ley Chon had sole and actual possession of the E dangerous drugs. In view of the aforesaid probable inferences, the benefit of the doubt must be given to the accused. In light of the evidence and the surrounding circumstances the court was not satisfied that the prosecution had proved a *prima facie* case of actual possession against the accused. (paras 28 & 29)

F **Case(s) referred to:**

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 ***(refd)***
Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
G *Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC* ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Lee Chee Meng v. PP[1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 SC ***(refd)***
Mat v. PP [1963] 1 LNS 82 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
H *Ong Ah Chuan v. PP [1981] 1 MLJ 64* ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
I *PP v. Badrulsham Baharom [1987] 1 LNS 72 HC* ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 ***(refd)***
PP v. Muhamad Nasir Shaharuddin & Anor [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408 ***(refd)***
PP v. Ong Cheng Heong [1998] 4 CLJ 209 HC ***(refd)***
Saludin Surif v. PP [1997] 3 CLJ 529 CA ***(refd)***
Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 SC ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 ***(refd)***
Yee Ya Mang v. PP [1971] 1 LNS 156 ***(refd)***

Legislation referred to:
Arms Act 1960, s. 9(a)
Criminal Procedure Code, s. 180
Dangerous Drugs Act 1952, ss. 2, 37(da), 39B(1)(a)
Evidence Act 1950, s. 114(g)

For the accused - Hisyam Teh Poh Teik (Sukhaimi & MJ Pereira with him); M/s Teh Poh Teik
For the prosecution - Jean Sharmila (Azreen, Shahrizal & Laila DPP with her) DPP's

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JUDGMENT

Vernon Ong Lam Kiat JC:

[1] The accused was charged with an offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in Cannabis weighing 476.33 grams. The charge is as follows:

> Bahawa kamu pada 19 Februari 2004, lebih kurang jam 4.00 petang di rumah No. 6, Jalan Keembong 31, Taman Johor Jaya, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta-zim, telah didapati mengedar dadah berbahaya iaitu 476.33 gram Cannabis dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh di hukum di bawah Seksyen 39B(2) Akta yang sama.

Prosecution's Case

[2] On 19 February 2004 ASP Mohd Azhan bin Mohd Yusof (PW4) received information of alleged drug activities at a house known as No. 6, Jalan Keembong 31, Taman Johor Jaya, Johor Bahru. PW4 led a raiding party team of 9 police officers to the

said address. They arrived at the said address at about 4pm. It is a single storey house. A Proton Wira No. 6753 was parked in the porch of the house. The front gate of the house was not locked and PW4 opened it. PW4 and his police party entered into the porch of the house. When they got to the front door, PW4 saw that the sliding door was open but the iron grill was locked. PW4 also saw four Chinese men at the hall. PW4 immediately identified himself as a police officer and showed his authority card. All the men in the hall ran away in different directions. PW4 saw three of the Chinese men running towards the back portion of the house whilst one entered into the front room. PW4 and his men had to force open the iron grill using a crow bar. Upon entering into the house PW4 found that the door to the front room was not locked. PW4 opened the door and found a Chinese man (later identified as the accused) inside. PW4 then instructed DSM Alias and Sjn Ravi to take him into custody. In another room near the kitchen, PW4 saw three Chinese men. They were also taken into custody and then brought into the front room. PW4 then conducted body searches on all the Chinese men. Nothing was found on the accused, Chua Teik Li and Chua Seng Lee. However, a transparent packet suspected of containing heroin was found in the right pocket of Lee Ley Chon's jeans. PW4 then conducted a search of the front room. PW4 found a 'GIANT' plastic bag on the shelf inside a plastic cupboard with its zipper open. The plastic bag contained two brown envelopes. PW4 opened the said envelopes in front of all the four suspects. In one envelope a slab of compressed plant material suspected to be ganja was found. In the other envelope were found two slabs, one big and one small also suspected to be ganja. A Maybank account book (P16), a passport (P17) and a birth certificate (P18) all in the name of Chua Teik Beng were also found in the same place. All the four Chinese men were arrested and charged in the magistrates court *vide* Arrest No. A8-865-04 (exh. D34). They were charged with an offence under s. 39B DDA. Subsequently, the charges against Chua Teik Li and Lee Ley Chon were withdrawn. Chua Seng Lee died while in remand.

[3] In his evidence the chemist (PW3) testified that he conducted the four standard tests namely, (i) the visual examination, (ii) microscopic examination, (iii) Duquenois-Levine (D-L) test, and (iv) thin layer chromatography test on the slabs of compressed plant material. He confirmed that the said plant material was

cannabis as defined under s. 2 DDA having a net weight of 476.33 grams. PW3 also testified that he conducted three tests namely, (i) Frohde Test and Marquis Test, (ii) Gas Chromatography Mass Specttophotomectry (GCMS), and (iii)Gas Chromatography (GC) on the yellow powder found in the transparent packet (P13). He confirmed that the said yellow powder was heroin as defined under the First Schedule DDA having a net weight of 0.07 gram.

[4] The prosecution also called Leong Sew Koon (PW5). PW5 testified that the house in question belonged jointly to her younger sister and brother. PW5 also testified that the house was rented out to Chua Kok Chin (PW9) since 1999 until 2004. PW5 identified a tenancy agreement (P25) for the house which provided for a tenancy of the house for a term of one year from 1 May 2003 until 30 April 2004. PW5 said that she collected the rental monthly and that she would issue receipts for the same. PW5 usually collected the rental from PW9 at PW9's char kuay teow stall. If PW9 did not pay the rental then the rental would be paid by the accused. PW5 also said that she only knew that PW9 sons stayed at the house. PW5 was not sure about any other occupants. PW9 testified that he stayed in the house together with his three sons, Chua Seng Lee, Chua Teik Li and the accused. PW9 said that there are three rooms in the house. PW9 occupied the second room. The third room is unoccupied. Sometimes PW9 rented out the third room. PW9 said that all his three sons occupied the first room.

[5] Learned deputy submitted that the prosecution must prove *mens rea* possession. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it (*Parlan Dadeh v. PP* [2009] 1 CLJ 717 FC) However, possession it not to be termed exclusive. It need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors must have power to exclude other persons from enjoyment of the property (*PP v. Denish Madhavan* [2009] 2 CLJ 209 FC). It was submitted that to prove possession the prosecution needs to prove: (i) that the accused had knowledge of the drugs, and (ii) that the accused had some form of custody and control over the drugs which were found. Learned

deputy submitted that there is strong evidence to support a finding that the accused was 'found to have had in custody or under control' the drugs. The surrounding circumstances pointing irresistibly to the guilty knowledge of the accused include:

(1) Conduct of the accused in running to the front room where the drugs were found when the police raided the house. This shows his state of mind (*PP v. Baharom* [1987] 1 LNS 72); and

(2) The fact that the accused ran to the room where the drugs were found. It was in the exact place where the drugs were found that the accused's Maybank book, passport and birth certificate were also found. This should be sufficient as complete and direct proof that he had knowledge of the existence of the cannabis in the bag and was therefore in possession of it *(PP v. Denish a/l Madhavan, supra)*.

[6] Learned deputy also submitted that the amount of the drugs involved is 473.33. grammes of cannabis which is more than twice the amount necessary to raise the presumption of trafficking under s. 37(da) DDA. The necessary implication is that the drugs were not for personal use. There is direct evidence from PW4 that the accused's personal items such as his Maybank book, his passport and his birth certificate were found in the same place where the drugs were found. The accused must have placed the drugs in a place which he deemed safe enough to place these rather important personal documents. Although there were others staying in the house their personal documents were not found in the said cupboard. This shows that only the accused had sole use of the said cupboard. There were three other plastic cupboards in the house but only in this cupboard in the room contained the personal documents of the accused. Therefore the inference which must be drawn is that he had control and custody of the said cupboard and its contents.

Defence's Contention

[7] Learned counsel for the accused submitted that there was no evidence of custody or control of the drugs. Therefore the presumption under s. 37(da) DDA that the accused was trafficking in dangerous drugs did not arise *(Muhammed Hassan v. PP* [1998] 2 CLJ 170; *Yee Ya Mang v. PP* [1971] 1 LNS 156;

Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428). The prosecution failed to prove exclusive possession on the part of the accused.

[8] Firstly, the accused was arrested together with three other men in the house. The investigating officer C/Insp Nasir bin Jappiry (PW6) confirmed that all four were charged jointly with an offence of trafficking. The charges against two of them were withdrawn. The charge against Chua Seng Lee could not be sustained as he died on 23 June 2005 in remand.

[9] Secondly, the drugs were found on the top shelf of the plastic cupboard which was open. Anyone could have access to the cupboard at any point of time. No evidence was led to show that the shirts and T-shirts hanging inside the wardrobe belong to the accused. No evidence was led to show that the wardrobe belongs solely to the accused.

[10] Thirdly, the accused did not have exclusive access to the house and the front room. According to PW6, the house was resided by the accused, Chua Seng Lee (deceased), Chua Teik Li, and the accused's father (PW9). At the time of the raid, Lee Ley Chon was also in the house and he was arrested together with the accused, Chua Seng Lee and Chua Teik Li. According to PW9 his sons' friends would stay over at the house at times. All three brothers shared the front room where the drugs were found. PW9 also agreed that the three brothers and their friends could enter and exit from the front room at any point of time. This is corroborated by the fact that the front room is the only room where the following items were found, namely (i) double and single mattresses; (ii) TV and video player (exhs. P3F & G); plastic cupboard with shirts and T-shirts hanging (exh. P3G, H & I). According to PW9 he occupied the second room solely. The third room was not occupied and at times was rented out to others. PW9 also said that he and all three of his sons had the keys to the house.

[11] Learned defence counsel further submitted that the prosecution failed to exclude the possibility of access by others to the house and to the front room where the drugs were found (*PP v. Ong Cheng Heong* [1998] 4 CLJ 209). The prosecution must prove that no other persons had access to the front room and wardrobe where the drugs were found (*Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1). The prosecution did not call Chua Teik Li

A or Lee Loy Chon to give evidence (*Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265, *Saludin Surif v. PP* [1997] 3 CLJ 529; *Lee Chee Meng v. PP* [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168, *Gooi Loo Seng v. PP* [1993] 3 CLJ 1, *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43; *PP v.* B *Muhamad Nasir Shaharuddin & Anor* [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408).

[12] By reason of the prosecution's failure to call Chua Teik Li or Lee Ley Chon to testify, the following inferences can be C drawn: (1) that the accused alone had sole and actual possession of the dangerous drugs; (2) that the accused, Chua Teik Li, Chua Seng Lee and Lee Ley Chon had joint possession of the dangerous drugs; or (3) that Chua Teik Li or Chua Seng Lee or Lee Ley Chon had sole and actual possession of the dangerous D drugs. As more than one inference can be drawn the benefit of the doubt must favour the accused (*Tai Chai Keh v. PP* [1948] 1 LNS 22).

[13] Learned counsel also alluded to the possibility that there E could be more than four persons staying in the house. A photograph taken of the hall (exh. 3E) shows a wooden and plastic wardrobe in the hall. PW6 did not investigate into the ownership of both wardrobes. PW6 agreed in cross-examination that he was unable to deny if the wardrobe belongs to one "Ah F Lee". Therefore, it could be inferred that the person "Ah Lee" also stayed in the house.

[14] It was also contended that there is a further gap in the prosecution's case. The prosecution failed to call two important witnesses Chua Teik Li and Lee Ley Chon. They ought to have G been called in order to exclude the possibility that they had possession of the dangerous drugs (*Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; s. 114(g) Evidence Act 1950).

H **[15]** Finally, it was submitted that the accused had no knowledge of the presence of the dangerous drugs found in the wardrobe. There is no evidence, direct or circumstantial, to show that the accused had such knowledge. The envelopes (P10A & B) were found inside a plastic bag. The envelopes are not transparent. The I drugs would not be seen at all. The fact that the accused's photograph, birth certificate and Maybank account book was

found in close proximity to P10 is insufficient to conclude that the accused had possession of P10A & B (*PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285). Learned counsel for the accused submitted that the prosecution has failed to make out a *prima facie* case.

The Law

[16] In a charge under s. 39B(1)(a) DDA to which s. 2 also applied, the onus lies upon the prosecution to prove the following ingredients of the offence *viz*,:

(1) that the accused had possession of the dangerous drugs in question;

(2) that the accused did traffic in the dangerous drugs in question.

[17] In proving the said ingredients the prosecution may elect to invoke the presumption of possession under s. 37(d) or the presumption of trafficking under s. 37(da). If the prosecution elects not to invoke the presumption of possession under s. 37(d), then it is incumbent upon the prosecution to adduce evidence so as to establish that the accused had possession of the dangerous drugs independent of the statutory presumption. If, on the other hand, the prosecution elects not to invoke the presumption of trafficking under s. 37(da) then it is incumbent upon the prosecution to adduce evidence that the accused was trafficking in the dangerous drugs within the meaning as defined in s. 2 DDA.

Possession

[18] What constitutes 'possession' under s. 37 is a question of law (see *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 at p. 349). In *Yee Ya Mang v. Public Prosecutor* [1971] 1 LNS 156 the appellant was charged under s. 9(1)(a) of the Arms Act 1960 for having in his possession a pistol and three rounds of ammunition, without an arms licence or an arms permit. The pistol and the three rounds of ammunition were not found in the house occupied by the appellant but at a spot in a rubber estate pointed out by the appellant. In the course of police investigations the appellant said that he had a revolver. Subsequently, he took the police officer to the spot where the revolver was found. The spot

pointed out by the appellant was a pit, covered by pieces of wood, underneath which was found a plastic bag. Inside the plastic bag was a stocking containing the subject matter of the charge. About an hour earlier the appellant had taken the police to a different spot in another rubber estate from which a toy pistol was recovered. Sharma J described 'possession' in the following manner:

> The word 'possession' implies a physical capacity to deal with the thing as one likes to the exclusion of everyone and a determination to exercise that physical power on one's own behalf. It implies dominion and consciousness in the mind of the person having 'possession' that he not only has such dominion but also that he can exercise it. In the present case if, for example, the accused had gone alone to the spot in question and took out the loaded pistol from the place of concealment, the loaded pistol could be said to be in the possession of the accused as it lends support to the conclusion that it was within his exclusive knowledge as to where this pistol was kept concealed in the rubber estate. There may, however, be cases where a court is not justified in presuming possession of the person who had mere knowledge of the articles concealed. A good deal depends upon whether the production was accompanied by information given by the accused in custody as would be admissible under section 27 of the Evidence Ordinance. Such information can be relied on by the prosecution as incriminating evidence against the accused along with the production or discovery of the articles in question but the mere production of such articles by itself would not necessarily prove his possession. It would at the most show that he had knowledge where the articles were kept or concealed. Thus, when it is proved that the accused made a statement to the effect "I have concealed the articles at a particular place and I will produce them" and if those articles are discovered in consequence of that statement, that would be evidence of his possession even though those articles were kept or concealed in another man's property, because unless he had possession he would not have kept them at that place. When, however, the accused without stating that he had concealed those articles merely produces them from a place to which other people could have access, it would not be sufficient to establish his possession even though the articles may be found carefully concealed and hidden because that is quite consistent with any person having done so and the accused might merely have knowledge of it. In the absence of any incriminating statement made by the accused

leading to the discovery of the articles, their production alone from another man's land cannot be sufficient to establish the accused's possession. It may at the most show his knowledge that the articles were concealed there.

This principle was discussed at length by Lim Beng Choon J in the case of *Public Prosecutor v. Badrulsham bin Baharom* [1987] 1 LNS 72:

I believe it is well settled at least by our courts that to establish possession by an accused person of any dangerous drugs or to impute to him possession of the said drugs it must first be shown that he had knowledge of the drugs which were found to be in his possession. The earliest authority, which I could find, that expounded this principle is the case of *Chiah Tian v. Rex* where the then Chief Justice of Singapore said at p. 106:

> In my opinion, possession to be an offence must be possession under such circumstances that a court is justified in finding that the accused (or the servant in cases of constructive possession) was conscious of the possession. As Pollock C.B. put it in *The Queen v. Woodrow* 16 LJMC 122, 'a man can hardly be said to be in possession of anything without knowing it' and I think that a person is not guilty of the offence of possession if he is not aware of the possession. (emphasis added)

This principle was expounded with great clarity in the case of *Leow Ngee Lim v. Regina* at p. 31:

> In some of the cases it has been said that without knowledge there can be no possession. In others, 'in possession' has been read as 'knowingly in possession' by application of the doctrine of *mens rea*. In some instances either view leads to the same result but not in all. The *dicta* does not make what degree of knowledge is meant. Also in some of the statutes, 'possession' and 'knowledge' have been treated separately and much confusion has resulted.
>
> The word 'possession' is a vague and general word which cannot be closely defined. *Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge.* This is recognised in the present Drugs Ordinance which provides, by the presumption already cited, that if a man has custody or control of a drug the onus of proving, first that he did not have possession, and secondly that he did not know the nature of the drug, shall be shifted to him. (emphasis added)

Then in *Saad bin Ibrahim v. Public Prosecutor* Yong J was quite emphatic as to the requirement of the element of knowledge on the part of the possessor before he could be criminally incriminated with possession of a prohibited article. Thus his Lordship said at p. 159:

> In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without mens rea possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

The principle of possession with *mens rea* has been steadfastly adhered to by our courts in construing the word possession as used in section 37(d) of the Act. Although there can hardly be any dispute that the existence of this element of knowledge is necessary to establish possession the difficulties lie in applying this principle to the facts of each individual case bearing in mind that notwithstanding the shifting of the burden of rebutting possession of the dangerous drugs to the accused upon the successful invocation of the presumption under s. 37(d) of the Act, all that is required of the accused to rebut the presumption is for him to show upon a balance of probabilities that he was not aware of the dangerous drugs which were said to be under his possession. Knowledge being an element of the state of mind of a person, the obvious question is: how is one to prove the element of knowledge in order to establish possession. However that may be, certain modes of proof are acceptable as sufficient to distinguish between a genuine and a feigned defence. Those modes of proof are acceptable because unless a defendant confesses that he has the necessary knowledge which is an element of his state of mind such element must be judged from his outward acts or omissions.

[19] As mere custody and control is insufficient to establish possession for the purpose of the DDA, knowledge of such drug by the accused must be established. However, whether or not in a given case a person can be said be in possession of something is a question of fact. In *Chan Pean Leon v. Public Prosecutor* [1956] 1 LNS 17 Thomson J dealt with the issue of possession under the Common Gaming Houses Ordinance 1953 and he observed:

"Possession" itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edition, page 304):

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do in case of need.

To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but is frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set exhaustively and it is impossible to lay down any general rule on this point. But there must something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.

And further down on the same page he added:

> Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite.

That knowledge cannot be proved by direct evidence was also reiterated in the judgment of the Privy Council in *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64 appearing at p. 69:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity larger than is likely to be needed for his own consumption the inference that he was trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as contained in section 15 of the Drugs Act. (emphasis added)

And further down in the same page:

> Whether the quantities involved is large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under section 3.

[20] The question of knowledge necessary to establish possession was enunciated by the Federal Court in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 where three packages containing cannabis were recovered from under the driver's and the front passenger's seats in a car driven by the accused. At pp 349-352 Arifin Zakaria FCJ(now CJM) speaking for the Federal Court said:

> Therefore, the presence of the 3 packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature. (see also *Lim Beng Soon v. Public Prosecutor* [2000] 4 SLR 589). We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge. In this regard it is pertinent to refer to the observation of the Singapore Court of Appeal in *Zulfikar bin Mustaffah v. PP* [2001] 1 SLR 633, at p. 639:

21. For the element of 'possession' (within the meaning of s. 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v. Metropolitan Police Commissioner* [1969] 1 AC 256; *Tan Ah Tee & Anor v. PP* [1978-1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.

22. We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlars could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How J remarked in *PP v. Hla Win* [1995] 2 SLR 424 (at p. 438):

In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses. (emphasis added)

In *Ramis a/l Muinandy v. Public Prosecutor* [2001] 3 SLR 534, the Singapore Court of Appeal again propounded on the question of knowledge necessary to establish possession and at p. 541 states:

Knowledge of drugs

The starting point in the consideration of this issue was that we had already concluded that the drugs was already on Ramis's motorcycles when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead to a strong inference that Ramis knew that the bag found on his motorcycle contained drugs.

In *Tan Ah Tee (supra)*, Wee Chong Jin CJ, delivering the judgment of the court said ([1978-1979] SLR 211 at 2170218; [1980] 1 MLJ 49 at p. 52):

> Even if there is no statutory presumption available to the prosecution, once the prosecution had proved the fact of physical control or possession of the plastic bag and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in their minds that she had possession of the contents within the meaning of the Act.

The issue of knowledge necessary to establish possession came to be considered by the English House of Lords in the case of *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356, which was considered and relied upon by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v. PP (supra)*. In Warner the following question was posed to their Lordships:

> Whether for the purpose of section 1 of the Drugs (Prevention of Misuse) Act, 1964, a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature.

At p. 367 Lord Reid addressed the issue as follows:

> The object of this legislation is to penalise possession of certain drugs. So if *mens rea* has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.

In the same case Lord Morris answered the question in the following manner:

> If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would be no possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[21] More recently the Federal Court in the case of *PP v. Denish Madhavan* [2009] 2 CLJ 209 considered the propriety of treating possession of an article in criminal law as exclusive possession. It is instructive to reproduce what Abdul Aziz bin Mohamad FCJ said at paragraph nos. 16-19:

> 16. Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about "exclusive" possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, – that is, "exclusive" – that a conviction is possible. When the learned trial judge said "The accused sought to negative the proof of exclusive possession ...". we must take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.

17. The idea of exclusivity features in the meaning of "possession" in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v. Reg.* [1955] 1 LNS 53:

> ... It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
>
> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

18. Thomson J, in *Chan Pean Leon v. Public Prosecutor* [1956] 22 MLJ 237, said that "possession" for the purposes of criminal law involves possession itself – which some authorities term "custody" or "control" – knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th edn, p. 304), in which the exclusive element mentioned by Taylor J appears:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

19. Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.

Burden And Standard Of Proof At Close Of Prosecution's Case

[22] At the close of the prosecution's case, it is the duty of the court to consider whether the prosecution has made out a *prima facie* case against the accused. In this respect, s. 180 of the Criminal Procedure Code ('CPC') provides as follows:

Section 180

(1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(2) If the court finds that a *prima facie* case has not been made out against the accused, the court shall record an order of acquittal.

(3) If the court finds that a *prima facie* case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.

[23] What is the standard of proof on the prosecution at the close of its case? Subsection (1) makes it clear that the standard of proof is on the prosecution to make out a *prima facie* case. Subsection (2) provides that the court shall record an order of acquittal if a *prima facie* case has not been made out. On the other hand, if a *prima facie* case has been made out subsection (3) provides that the accused shall be called upon to enter his defence. Thus, whether or not the accused is acquitted or called upon to enter on his defence at the close of the prosecution case turns on the meaning of the phrase '*prima facie* case'.

[24] In *Balachandran v. PP* [2005] 1 CLJ 85 the Federal Court when called upon to consider the standard of proof on the prosecution at the close of the case for the prosecution has this to say at p 99:

> A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase "*prima facie* case" is defined in similar terms in *Mozley and Whitley's Law Dictionary*, 11th edn as:
>
> > A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

And continuing at p. 100,

> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case of the prosecution. If there is any such doubt there can be no *prima facie* case.

[25] In order to determine whether the elements of the offence have been established, the court must undertake a positive evaluation of the credibility and reliability of all the evidence adduced. In this regard the court must undertake a maximum evaluation of the prosecution evidence. In *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 the Federal Court has this to say at p 465:

> After the amendments to ss. 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a subordinate court and the High Court under the amended section is to call for the defence when it is satisfied that a *prima facie* case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter on his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused. See, *Tai Chai Keh v. PP* [1948-49] MLJ Supp 105; *PP v. Kasmin b Soeb* [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case,

comes to the conclusion that a *prima facie* case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. If the accused elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the *prima facie* case, one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under ss. 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See, *Dato Mokhtar b Hashim & Anor v. PP* [1983] 2 MLJ 232. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted. (emphasis added)

[26] In short the steps that should be taken by this court at the close of the prosecution's case are as follows:

1. At the close of the prosecution's case, subject the evidence led by the prosecution in its totality to maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

2. Ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence before me? If the answer to that question is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "No" then, a *prima facie* case has not been made out and the accused should be acquitted;

3. After the defence is called, the accused elects to remain silent, then convict;

4. After the defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. PP* [1963] 1 LNS 82.

A **Findings Of The Court**

[27] In the circumstances aforesaid did the accused have possession of the dangerous drugs? Before the accused can be criminally incriminated with possession of the dangerous drugs the
B requirement of knowledge on the part of the accused must be satisfied. The accused must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it *(Saad Ibrahim v PP, supra)*. Knowledge is an element of the state of the mind of a person. To establish
C possession the element of knowledge must be judged from his outward acts or omissions. Knowledge cannot be proved by direct evidence. It can only be inferred from the surrounding circumstances. The purpose with which he did an act is a matter of inference from what he did. In short, it is for the court to draw
D an inference from all the facts and circumstances of this case, giving due weight to the credibility of the witnesses *(PP v. Abdul Rahman Akif, supra)*.

[28] In this case at the time of the police raid there were four
E persons in the house. PW9 said that the accused and his two brothers shared the front room where the drugs were found. PW9 also said that all three brothers could enter and exit the front room at any time. PW9 and all two brothers had the keys to the house. It is also pertinent to note that in the front room
F were two mattresses, a single and a double. There was also a television and a video player and a plastic cupboard in the front room. The living room was bare save for two cupboards, one wooden and one plastic. In the circumstances, there is therefore a possibility others may have access to the house and to the front
G room. In this respect, neither Chua Teik Lee or Lee Ley Chon (who were in the house at the time of the police raid and were also arrested together with the accused but subsequently released) were called to give evidence in court. Chua Teik Lee and or Lee Ley Chon ought to have been called and examined on their
H evidence. The plastic cupboard in the first room in which P10 together with the contents P10A & B was found was open and that anyone can have access to it. They could have shed some light on the question. In their absence the following inferences can be drawn:

I

(i) that the accused alone had sole and actual possession of the dangerous drugs; or

(ii) that the accused, Chua Teik Lee, Chua Seng Lee (deceased) and Lee Ley Chon had joint possession of the dangerous drugs; or

(iii) Chua Teik Lee or Chua Seng Lee (deceased) or Lee Ley Chon had sole and actual possession of the dangerous drugs.

[29] In view of the aforesaid probable inferences, the benefit of the doubt must be given to the accused. Further, there was some degree of corroboration in the prosecution investigation to the defence's contention that there were two others sharing the front room. There is therefore sufficient evidence to show that there were at least two persons sharing the front room with the accused in which the dangerous drugs were found. In the light of the evidence and the surrounding circumstances the Court is not satisfied that the prosecution has proved a *prima facie* case of actual possession against the accused. The accused is accordingly acquitted and discharged.